THONG KIM CHEA @ THONG MING KWEI

v.

THONG SENG & CO. SDN. BHD. & ANOR.

COURT OF APPEAL, KUALA LUMPUR
DATO' N.H. CHAN JCA
DATO' MAHADEV SHANKAR JCA
DATO' V.C. GEORGE JCA
[CIVIL APPEAL NO. N-08-326-95]
10 JULY 1995

PRACTICE & PROCEDURE: *Appeal - Leave - Application for leave made out of time - Whether formal application for extension must be made - Absence of explanation for delay - Absence of merits - Effect.*

PRACTICE & PROCEDURE: *Pleadings - Amendment - Further and better particulars - Order appealed against purely interlocutory in nature - Whether parties at liberty to put pleadings in proper order.*

The applicant herein was holding a position of trust in the first respondent company. In December 1991 allegations were made by the company that the applicant had drawn cash cheques without authority which resulted in the defalcation of a very large amount of the company's funds. The applicant could not account for the missing cash, and to resolve the matter it was mutually agreed that the applicant would transfer his property at No. 41, Jalan Besar, Bahau in consideration for the missing amount being written off. Despite the agreement, the applicant put up a caveat against the said property, and the result was that registration of the transfer could not be effected. The respondents thereupon filed a motion for the removal of the caveat. The applicant responded by filing a writ in which he alleged that the transfer was executed under duress and should be set aside, and to this, the respondents filed a defence and counter claim, applying for a declaration that the transfer was valid and for cancellation of the caveat. The applicant then applied for further and better particulars which the respondents complied by supplying in all three sets of particulars, but reserving the right to provide further particulars if the same became available. The respondents subsequently applied to amend the said second set by including unauthorized transactions made by the applicant in 1986 and 1987. The Registrar allowed the amendment and the applicant appealed. The learned Judge dismissed the appeal on 28 April 1995 and some 40 days later, on 8 June 1995, the applicant applied for leave to appeal to the Court of Appeal. Before the appeal Judges the appellant *inter alia* argued that leave to amend should never have been granted as it would have the effect of depriving him of the defence of limitation.

Held:

Per Mahadev Shanker JCA (N.H. Chan and V. C. George JJCA concurring):

[1] In the instant case the order sought to be appealed against was purely interlocutory. The parties were therefore completely at liberty to put their pleadings in proper order and to ventilate the issue as to whether the counter-claim was time barred at the trial of the action below.

[2] The appellant's contention in respect of the deprivation of the defence of limitation, if properly pleaded, should have been argued and established at the trial of the action.

That aside, this was a case where breach of trust has been implied which means that there is no limitation. And in any event the substantial cause of action of the respondents was to enforce a transfer made in 1991.

[3] The rules require that this application for leave should have been made within one month from the date of judgment of the High Court. Clearly, the motion here was filed outside the period allowed and no formal application was made for extension of time. On top of that no explanation was offered for the delay and the failure to apply for enlargement of time. On the facts the case was also lacking in merits.

[Application dismissed].

*[**Bahasa Malaysia** Translation of Headnotes]*

AMALAN & PROSEDUR: *Rayuan - Kebenaran - Permohonan untuk kebenaran dibuat di luar masa - Samada permohonan rasmi untuk perlanjutan harus dibuat - Ketiadaan penjelasan bagi kelewatan - Ketiadaan merit - Kesan.*

AMALAN & PROSEDUR: *Pliding - Pindaan - Butir-butir lanjut dan lebih baik - Perintah terhadap mana dirayui bersifat interlokutori sepenuhnya - Samada pihak-pihak mempunyai kebebasan untuk meletakkan pliding menurut aturan yang betul.*

Pemohon di sini memegang jawatan amanah dalam syarikat responden pertama. Dalam bulan Disember, 1991 tuduhan telah dibuat oleh syarikat bahawa pemohon telah mengeluarkan cek-cek tunai tanpa kebenaran yang mana telah mengakibatkan penggelapan satu jumlah wang yang besar dari syarikat tersebut. Pemohon telah tidak dapat menjelaskan mengenai kehilangan wang tersebut, dan bagi menyelesaikan perkara tersebut, telah dipersetujui bersama bahawa pemohon akan memindahkan hartanya di No. 41, Jalan Besar, Bahau sebagai balasan bagi membatalkan jumlah wang yang kehilangan itu. Sungguhpun terdapat persetujuan pemohon telah memasukkan kaveat terhadap hartanya dan akibatnya pendaftaran pindahmilik tidak dapat disempurnakan. Responden dengan itu telah memfailkan satu usul bagi membatalkan kaveat tersebut. Pemohon telah bertindak-balas dengan memfailkan satu writ dalam mana beliau mengatakan bahawa pindahmilik tersebut telah disempurnakan di bawah tekanan dan haruslah diketepikan, dan kepada hal ini, responden pula telah memfailkan satu pembelaan dan tuntutan balas memohon untuk mendapatkan pengisytiharan bahawa pindahmilik tersebut adalah sah dan bagi pembatalan kaveat tersebut. Pemohon kemudiannya memohon untuk mendapatkan butir-butir lanjut dan lebih baik, yang mana telah dituruti oleh responden dengan membekalkan tiga set butiran, tetapi melindungi hak untuk memberikan butir-butir seterusnya jika perkara yang sama kedapatan. Responden kemudiannya memohon untuk meminda set yang kedua tersebut dengan memasukkan transaksi-transaksi yang tidak dibenarkan yang telah dibuat oleh pemohon dalam tahun 1986 dan 1987. Pendaftar telah membenarkan pindaan tersebut dan pemohon telah merayu. Tuan Hakim yang bijaksana telah menolak rayuan itu pada 28 April 1995 dan lebih kurang 40 hari kemudiannya, pada 8 June 1995, pemohon telah memohon kebenaran untuk merayu kepada Mahkamah Rayuan. Di hadapan Hakim-Hakim rayuan, perayu telah antara lainnya berhujah bahawa kebenaran untuk meminda tidak seharusnya diberikan, kerana ianya akan mempunyai kesan melucutkan haknya kepada pembelaan penghadan.

Diputuskan:

Oleh Mahadev Shanker HMR (N.H. Chan dan V. C. George HHMR menyetujui):

[1] Dalam kes semasa ini, perintah terhadap mana rayuan dibuat adalah sesungguhnya bersifat interlokutori. Pihak-pihak tersebut dengan itu mempunyai kebebasan sepenuhnya bagi mengemukakan pliding-pliding mereka dalam susunan yang betul dan untuk menyuarakan isu tersebut samada tuntutan balas tersebut telah dihadkan oleh masa di perbicaraan tindakan di bawah.

[2] Penegasan perayu berhubung dengan perlucutan-hak pembelaan penghadan, jika diplidkan dengan wajarnya, seharusnya dihujahkan dan ditentukan diperbicaraan tindakan tersebut. Selain itu, ini merupakan kes di mana pecah amanah telah tersirat yang bermakna tidak terdapat penghadan. Dan dalam apa keadaan pun, kausa tindakan yang substansial bagi responden adalah untuk menguatkuasakan satu pindahmilik yang telah dibuat dalam tahun 1991.

[3] Kaedah-kaedah menghendaki supaya permohonan untuk kebenaran ini dibuat dalam tempoh satu bulan daripada tarikh penghakiman Mahkamah Tinggi. Dengan jelasnya, usul di sini telah difailkan di luar tempoh yang dibenarkan dan tidak terdapat permohonan resmi yang dibuat untuk perlanjutan masa. Lebih-lebih lagi tidak terdapat penjelasan yang diberikan bagi kelewatan tersebut dan kegagalan bagi memohon untuk mendapatkan perlanjutan masa. Berdasarkan fakta-fakta, kes ini juga tidak bermerit.

[Permohonan ditolak].

For the appellant - AKJ D'Cruz; M/s. AKJ D'Cruz & Co.
For the respondent - Deborah Kaur; M/s. Sri Ram & Co.

JUDGMENT

Mahadev Shankar JCA:

We dismissed this application for leave to appeal. Our reasons now follow. The applicant is hereafter referred to as the plaintiff and the respondents as the defendants.

On 3 June 1994 the Registrar gave leave to the defendants to amend a pleading, by way of further and better particulars of the defence and counterclaim. The plaintiff's appeal against the Registrar's decision was dismissed by the Judge on 28 April 1995. Desiring to appeal to this Court the plaintiff applied for leave.

The rules require that this application for leave should have been filed before 28 May 1995. However it was only filed on 8 June 1995. The solicitors for both parties were so informed by a letter of the Registrar dated 12 June 1995. The defendants' solicitors gave notice they would object to the application being proceeded with.

When the matter came before us on 10 July 1995, no formal application for an extension of time had been filed timeously or at all.

Plaintiff's Counsel then submitted that the plaintiff had affirmed an affidavit dated 7 July 1995 and sought to read it in support of his application. It is not clear if and when this affidavit was filed or served because it was not before us when the hearing commenced.

The plaintiff's solicitor claimed that he had prepared the notice of motion on 25 May 1995 and handed it together with the supporting documents to a courier. Why that courier could not file the documents until 8 June 1995 was not explained. Nor was it explained why no previous application had been timeously filed for an extension of time.

The other circumstances relevant to our dismissal go to the absence of merits. The plaintiff's statement of claim and his reply and defence to the counterclaim were not included in the record. However from the other papers it is apparent that the plaintiff was holding a position of trust in the first defendant company (the company) since he was authorised to draw cheques on the company's account. On 17 December 1991 there was an extraordinary meeting of the company in which the other directors and shareholders of the company confronted the plaintiff with an allegation that the plaintiff had drawn cash cheques to the amount of RM305,000 without proper authority resulting in defalcation of a very large amount of the company's funds. The defendants said that because the plaintiff could not account for the cash in hand which was missing, the parties came to an agreement whereby the plaintiff agreed to transfer his property, No. 41 Jalan Besar, Bahau the company in consideration for the amount that was missing being written off.

The transfer of this property was prepared and executed the following day in the office of Lee Boon Peng & Co., a firm of solicitors in Seremban and the title deed was handed over. But when the defendants went to register the transfer they found that the plaintiff had filed a caveat. They therefore filed a Motion No. 24-411-92 in the High Court for the removal of the caveat.

The plaintiff on the other hand filed a writ in this matter in the High Court on 8 December 1992. He alleged that the transfer was executed under duress and should be set aside. On 4 January 1992 the defendants filed a defence and counterclaim, stating that the consideration for the transfer was a shortfall of **about** RM204,944.53 in the company's account and that the transfer was voluntarily executed. The defendants prayed for a declaration that the transfer was valid, that the caveat be cancelled and alternatively for the monies owed by the plaintiff with interest.

The plaintiff applied further and better particulars of how the sum of RM204,944.53 was arrived at, which the defendants supplied on 7 April 1993. In it the defendants stated that these were the best particulars they could currently supply without prejudice to their right to supply further particulars should they become available thereafter. In summary these particulars averred that the RM204,944.53 reflected the amount stated in the first defendant's cash book after a physical cash count on 17 December 1991. The defendants stated that they had since further found other unauthorised transactions which they would disclose at the trial.

The plaintiff was not satisfied with these particulars and applied to Court for further particulars. The Registrar made an order accordingly and on 29 April 1993 the defendants supplied a second set of particulars. In it once again the defendants reserved their rights to provide further particulars as and when they become available and stated that there was a running account from 1982 to 1985 between the parties and the amount returned by the plaintiff towards the running account left a total of RM204,944.53 unaccounted for.

The plaintiff was still not satisfied and applied to strike out if the particulars he requested were not supplied and on 17 June 1993 the defendants filed a third set of particulars. In this they set out of the total amount drawn by the plaintiff for each of the years 1982, 1983, 1984

and 1985 amounting to RM416,100. Thereafter on 29 June 1993 the plaintiff filed his reply and defence to the counterclaim. This document is not before us.

On 28 August 1993 the defendants applied to amend their earlier particulars, supported by an affidavit stating that from further documents examined, the defendants' accountants had established that in the running account between the parties from 1982 to 1987 the plaintiff had taken out the sum earlier indicated and in addition an amount of RM72,900 in 1986 and RM114,200 in 1987 making the total amount withdrawn as at the end of 1987 RM603,200. The amendment prayed for was to the particulars supplied on 29 April 1993 by the inclusion of the withdrawals for 1986 and 1987.

The plaintiff's solicitor has not disclosed whether any affidavit was filed in opposition to this application. He says that the application was objected to but the notes of evidence of the proceedings before the Registrar or the Judge are not before us. We do not know what he pleaded in this reply and defence to the counterclaim. The pitch of his somewhat importunate submission was that this leave to amend should never have been granted because it would have the effect of depriving him of the defence of limitation. This submission is predicated upon the contention that the defendants cause of action arose between 1982 and 1985 and therefore the counterclaim being more than 6 years old cannot be maintained. Provided he had properly pleaded this the proper place for the plaintiff to establish such a contention was at the trial of the action.

What was plain and obvious from the defence and counterclaim and from the particulars supplied was that this was not a claim for a simple contractual debt. From the perspective of the defendants, here was a case where a breach of trust has been implied for which there is no limitation and also a defalcation which appears only to have come to light in 1991. In any event the substantial cause of action of the defendants is to enforce a transfer made in 1991. To add to this is the defendants' contention that the transfer itself is an acknowledgement in writing of the debt. When the alleged defalcations took place and much was purloined does not, in the context, appear to be relevant.

In the last analysis we felt that it should have been manifestly obvious that the order sought to be appealed against was purely interlocutory. The parties were therefore completely at liberty to put their pleadings in proper order and to ventilate the issue as to whether the counterclaim was time-barred at the trial of the action in the Court below.

We are consequently of the view that the application was an exercise in futility and had properly been dismissed with costs.

N. H. Chan JCA:

This was a motion by the plaintiff (applicant) for leave to appeal to the Court of Appeal against the decision of the High Court dismissing the plaintiff's appeal from the Registrar's order which allowed the defendants (respondents) to amend the further and better particulars of their defence. The High Court dismissed the plaintiff's appeal on 28 April 1995. On 8 June 1995, the present motion was filed outside the period allowed for the appeal and there was no application for enlargement of time, therefore, we dismissed the motion for leave with costs to the respondents.

V.C. George JCA:

I have the benefit of reading the judgment of my Brother Mahadev Shanker, HMR.

For the reasons given therein I agree that the application should be dismissed with costs.